Public Prosecutor v Thong Kian Oon & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 44–84 OF 2011
GHAZALI CHA J
16 FEBRUARY 2012

Criminal Procedure — Additional evidence — Application to adduce fresh evidence — Case concluded and submission completed — Supplementary affidavits — Filed at late stage of the proceedings and without leave of court — Whether should be allowed

Criminal Procedure — Forfeiture — Application for — Civil forfeiture — Criminal activities of money laundering and terrorism financing offences — Respondents alleged to have been involved in illegal public lottery and properties were proceeds of an unlawful activity — Respondents not charged for any predicate offence — Whether forfeiture application according to law — Whether properties obtained as a result of or in connection with s 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('Act') offence — Whether constitutional guarantees infringed — Whether s 56 of the Act inconsistent with art 13 of the Federal Constitution — Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4 & 56 — Emergency Ordinance (Prevention of Crime and Public Order) 1969 s 4A(1) — Federal Constitution art 13

The public prosecutor ('the applicant') filed this application for civil forfeiture under s 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the Act') for an order for forfeiture of several moveable and immovable properties belonging to the respondents which were the subject matter or were used in the commission of the offence under s 4 of the Act. The applicant alleged that the respondents had been involved in illegal public lottery and also properties that were proceeds of an unlawful activity under s 4A(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('Ordinance'). The respondents however, contended that they were not involved in any unlawful activity and that the properties were not the proceeds of an unlawful activity as claimed by the applicant. The respondents further submitted that it was not quite clear from the affidavit of the applicant, on which offence(s) the applicant was relying for purposes of this forfeiture application. Further, as there was no prosecution under the Act, the respondent contended that the applicant should not automatically resort to s 56 of the Act merely on the ground of the suspicious circumstances of the police without credible evidence to support the allegations. The issues for determination of this court, inter alia, were as follows: (i) whether there could be an automatic

A resort to s 56 of the Act merely on the ground of the suspicious circumstances of the police without credible evidence to support the allegations; (ii) whether the applicant had satisfied this court that the properties were the proceeds of unlawful activity; and (iii) whether the properties obtained by the respondents from the unlawful activity pursuant to s 4A(1) of the Ordinance was a serious B offence.

Held, dismissing the application for forfeiture:

(1) The focus at this stage was not so much on the question whether or not C the respondents' version was true. The focus was not on the wrongdoer, but on property that had been used to commit an offence or which constituted the proceeds of crime. Therefore, for the present application the guilt or wrongdoing of the owner of property was not primarily relevant to the proceedings (see para 17).

D (2) As the forfeiture application was a serious matter and the owner stood to lose property because the property was the subject matter of the offence of s 4(1) of the Act, it therefore demanded the applicant to set out clearly the case the respondents was called to answer. Unfortunately, however, there was no satisfactory proof from the applicant as to the offence they E were relying on for the purpose of a forfeiture application (see para 20).

(3) In this case, the evidence adduced was insufficient to satisfy this court that the properties were the subject matter of or was used in the commission of an offence under sub-s 4(1) of the Act. Further, the F properties which were claimed by the applicant as proceeds of unlawful activity of s 4A(1) of the Ordinance were not a subject matter of a serious offence. There was no sufficient evidence to link the crime committed and the property (see para 22).

G **[Bahasa Malaysia summary**

Pihak pendakwaan ('pemohon') memfailkan tindakan ini bagi perampasan sivil di bawah s 56(1) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('Akta') bagi suatu perintah perampasan beberapa harta boleh alih dan tidak boleh alih kepunyaan H responden-responden yang merupakan subjek perkara atau digunakan dalam melakukan kesalahan di bawah s 4 Akta. Pemohon mendakwa bahawa responden-responden terlibat dalam loteri awam haram dan juga harta-harta yang merupakan hasil daripada aktiviti haram di bawah s 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan'). I Responden-responden walau bagaimanapun, menghujah bahawa mereka tidak terlibat di dalam mana-mana aktiviti haram dan bahawa harta-harta tersebut bukan hasil daripada aktiviti haram seperti yang dinyatakan oleh pemohon. Responden-responden selanjutnya menghujah bahawa tidak jelas daripada afidavit pemohon, kesalahan mana yang disandarkan pemohon bagi

tujuan permohonan perampasan. Tambahan, oleh sebab tidak ada pendakwaan di bawah Akta, responden-responden menghujah bahawa pemohon tidak boleh secara automatik menggunakan s 56 Akta semata-mata atas alasan hal keadaan yang mencurigakan polis tanpa keterangan yang boleh dipercayai untuk menyokong dakwaan tersebut. Isu untuk pertimbangan mahkamah ini, antara lain, adalah seperti berikut: (i) sama ada boleh wujud penggunaan secara automatik s 56 Akta semata-mata atas alasan hal keadaan mencurigakan polis tanpa keterangan yang boleh dipercayai untuk menyokong dakwaan tersebut; (ii) sama ada pemohon memuaskan mahkamah bahawa harta-harta tersebut adalah hasil daripada aktiviti haram; dan (iii) sama ada harta-harta yang diperoleh responden-responden daripada aktiviti haram berikutan s 4A(1) Ordinan adalah kesalahan yang serius.

Diputuskan, menolak permohonan untuk perampasan:

(1) Fokus pada peringkat ini tidak banyak pada persoalan sama ada atau tidak versi responden-responden adalah benar. Fokus juga bukan kepada pesalah, tetapi pada harta yang telah digunakan untuk melakukan kesalahan atau yang membentuk hasil jenayah. Oleh demikian bagi permohonan ini kesalahan atau perbuatan salah pemilik harta tidak relevan kepada prosiding tersebut (lihat perenggan 17).

(2) Oleh sebab permohonan perampasan adalah perkara serius dan pemilik mungkin kehilangan harta kerana harta tersebut merupakan subjek perkara kesalahan di bawah s 4(1) Akta, ia dengan itu menuntut pemohon mengemukakan secara jelas kes yang mana responden-responden dipanggil untuk menjawab. Malangnya, tidak ada bukti yang memuaskan daripada pemohon mengenai kesalahan yang disandarkan mereka bagi tujuan permohonan perampasan (lihat perenggan 20).

(3) Di dalam kes ini, keterangan yang dikemukakan adalah tidak mencukupi untuk memuaskan mahkamah bahawa harta tersebut adalah subjek perkara atau yang digunakan untuk melakukaan kesalahan di bawah sub-s 4(1) Akta. Selanjutnya, harta-harta tersebut yang dinyatakan oleh pemohon sebagai hasil daripada aktiviti haram di bawah s 4A(1) Ordinan adalah bukan subjek perkara kesalahan yang serius. Tidak ada keterangan yang mencukupi untuk mengaitkan keterangan dengan kesalahan yang dilakukan dan harta (lihat perenggan 22).]

Notes

For a case on application to adduce fresh evidence, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 149.

For cases on forfeiture, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2039–2145.

Cases referred to

Arumugam Pillai v Government of Malaysia [1975] 2 MLJ 29, FC (refd)
Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & anor [1994] 3 AMR 40, SC (folld)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204, FC (refd)
SK Tangahkaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4, 4(1), 55, 56, 56(1), (2), 61 Part IV, Second Schedule
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3, 4A(1)
Federal Constitution arts 4(1), 5, 8, 9, 10, 13, 149(1)

Iskandar Shah Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Athimulan a/l Muruthiah (Athimulan & Co) for the respondent.

Ghazali Cha J:

[1] On 5 April 2011, the learned deputy public prosecutor ('the applicant') filed this application by way of notice of motion for civil forfeiture under s 56(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the Act'). The application is made for an order for forfeiture of the following property ('the properties'):

(a) the money in the sum of RM27,441 belonging to the second respondent at Block 2, Kompleks Pejabat Kerajaan, Bukit Perdana, Jalan Dato' Onn, 50502 Kuala Lumpur which was seized on 20 May 2010;

(b) the money in the sum of RM126,160.99 in a Saving Account No 1105002-7881 belonging to the second respondent at Hong Leong Bank Bhd, Cawangan Kangar, Perils, which was seized and frozen on 6 July 2010;

(c) the money in the sum of RM113,356.68 in an Account No 11000011359 belonging to the third respondent at Hong Leong Bank Bhd, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010;

(d) the money in the sum of RM69,301.94 in a current Account No 11000004098 belonging to the third respondent at Hong Leong Bank Bhd, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010;

(e) the money in the sum of RM28,967.50 in a junior saving Account No 11050022068 belonging to the third respondent at Hong Leong Bank Bhd, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010;

(f) the money in the sum of RM11,694.46 in a savelink Account No 6001441225 belonging to the third respondent at Public Bank Bhd, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010;

(g) the money in the sum of RM6,839.66 in a current Account No 11001006284 belonging to the fourth respondent at Hong Leong Bank Bhd, Cawangan Kangar, Perlis, which was seized and frozen on 6 July 2010;

(h) the money in the sum of RM3,549.58 in a current Account No 09030000-60052 at CIMB Bank Bhd, Cawangan Kangar, Perlis, belonging to the fourth respondent, which was seized and frozen on 6 July 2010;

(i) the money in the sum of RM179,988.50 in a Mortgage Plus HL CA Account No 11000011548 belonging to the fifth respondent at Hong Leong Bank Bhd, which was seized and frozen on 31 March 2011;

(j) a Maybank Bhd bankers' cheque dated 31 March 2011 bearing the No 121882 for the sum of RM5,000, which was seized on 31 March 2011;

(k) a CIMB bankers' cheque dated 15 March 2011 bearing the No 675957 for the sum of RM8,000, which was seized on 16 March 2011; and

(l) a EON bankers' cheque dated 30 March 2011 bearing the No 812797 for the sum of RM3,000, which was seized on 31 March 2011.

[2] The applicant's case was founded on the affidavits of the learned deputy public prosecutor (DPP), Mohd Khairuddin bin Idris affirmed on 5 April 2011 ('DPP Khairuddin's affidavit'); the affidavit of the Chief Inspector Muhammad Nazif bin Wahab ('Nazif's affidavit') and the affidavit of Inspector Syamsul Qamar bin Wahiruddin ('Syamsul's affidavit'). These three affidavits (encl 3) and the notice of motion (encl 2) were filed on 5 April 2011.

BACKGROUND

[3] The properties were seized from the respondents. The five respondents were identified as true and lawful owners of the properties. The applicant's affidavits confirm this fact. Except for the first two respondents, other respondents were not arrested for any offence under the Act. None of them were arrested for any predicate offence. No one is charged for any predicate offence. There is no prosecution launched against any of the respondents. The

A first two respondents were arrested under s 3 of the Emergency Ordinance 1969 and were subsequently restricted under s 4A(1) of the Emergency Ordinance 1969.

B **[4]** The notice of motion and the three affidavits were served on the respondents. All the respondents, except the first respondent, filed affidavits in reply to oppose the application for forfeiture. The applicant in this matter seeks a forfeiture order against the respondents owner of the properties, which the applicant contend that the properties were the subject matter or were used in the commission of the offence under s 4 of the Act. The applicant alleges that C the respondents have been involved in illegal public lottery and also the properties were proceeds of an unlawful activity under s 4A(1) of the Emergency Ordinance (Prevention of Crime and Public Order) 1969. The respondents in their affidavits in reply challenge the applicant saying that they were not involved in any unlawful activity and that the properties are not the D proceeds of the unlawful activity as claimed by the applicant. However, in deciding the present application it is necessary for me to refer briefly to the statutory framework.

E STATUTORY FRAMEWORK

[5] The Act as a whole is a response to a perceived growth in organised and related criminal activities of money laundering and terrorism financing offences. In this regard, the Act is in line with the international trends as it F encompasses not only criminal forfeiture but also the relatively new concept to our country of civil forfeiture. The Act provides for the forfeiture of the terrorist property and property involves in, or divided from money laundering and terrorism, financing offences, and for matters incidental thereto and connected therewith.

G **[6]** The present application involves Part VI of the Act. This part of the Act provides provisions for freezing, seizure and forfeiture of the property. The s 56 of the Act provides for 'civil forfeiture', as opposed to 'criminal forfeiture', which in turn, regulated by s 55 of the Act. The s 56 of the Act may be involved H even when there is no prosecution of any individual. By s 56 of the Act, the learned DPP is empowered to apply to a judge of the High Court for an order forfeiting to the state all the property that has been seized and frozen pursuant to this provision of this Part VI of the Act. This mechanism of forfeiture may only be invoked by order of the High Court.

I **[7]** In deciding whether there are satisfying grounds for believing that a forfeiture order may be made against the respondents, it must be borne in mind that application under s 56 of the Act requires proper proof of the relevant facts by means of admissible evidence. This court also takes cognisance of the

constitutional safeguards provided by art 13 of the Federal Constitution which reads, 'No person shall be deprived of property safe in accordance with law'.

[8] The Act was not enacted pursuant to art 149(1) of the Federal Constitution and therefore the constitutional guarantees enshrined in arts 5, 8, 9, 10 and 13 cannot be infringed at all. Therefore the freezing, seizure and the forfeiture of the property must be carried out according to the law. The enforcement agency must carry out their powers lawfully and not arbitrarily. In this connection, I need only recall the words of Justice Hashim Yeop A Sani (as he then was) in the case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 206, right hand column, para F, which reads:

> Article 13(1) in my opinion ensures the sanctity private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with the law which simply means that no one can be deprived of his property merely on the orders of
>
> Executive but that he *may be deprived of his property only m accordance in law*. (Emphasis added.)

[9] Since the provisions of the Act are penal and are designed to take away existing legal rights to property, it requires the provisions of the law are strictly adhered to s 56 of the Act.

[10] For ease of reference, I produce relevant provisions of the Act in this, namely s 56 and s 61.

They read:

> 56 Forfeiture of property where there is no prosecution
>
> (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.
>
> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (1) that the property is the subject-matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
>
> (2) that there is no purchaser in good faith for valuable consideration in respect of the property.

A (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

B (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

C **[11]** The mechanism of s 56(1) and 56(2) of the Act is as follows:

(a) the property is frozen or seized pursuant to the Act;

(b) there is no prosecution for an offence under s 4(1) of the Act;

D (c) before expiration of 12 months from the date of freeze or seizure, the learned DPP may apply to this court for an order of forfeiture provided that if he/she is satisfied that such property had been obtained as a result of or in connection with s 4(1) offence; and

E (d) upon a proper application made to the judge by the applicant, the judge shall make a forfeiture order if he is satisfied that, on the balance of probabilities that the property is the subject matter of the offence under s 4(1) of the Act and there is no purchaser in good faith for valuable consideration in respect of the property.

F **[12]** Therefore it follows that the court's function under this Act is not merely ministerial or executive character. The duty of the court is to be satisfied that on the balance of probability that the property is subject matter of the offence under s 4(1) of the Act. This is a justiciable issue and ought to be resolved based on the evidence adduced by the applicant. This court has the G determinative role in the process of evaluating the learned DPP's application for the making of the forfeiture order. It is my considered view that, it must be evaluated objectively to see whether the case is one when it is reasonable and proper to make the orders sought.

H ISSUES

[13] Learned counsel argued that s 56 of the Act is inconsistent with art 13 of the Federal Constitution and therefore by virtue of art 4(1) of the Federal Constitution it is void. The learned DPP countered his argument by I submitting that was required for the Legislation in question to be constitutional was for it to have been validly passed by the Parliament. Hence the validity of any duly enacted piece of Legislation could not be questioned on grounds of reasonableness, no matter how subjective or arbitrary the law appeared to be. On this issue, I do not find any force in the submission made

by learned counsel for the respondents; and I find merit in the submission made by the learned DPP. The decision of the Federal Court in the case of *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 clarified the correct position of the law that:

> Whenever a competent legislative enacts a law in the exercise of any of its legislative power, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking art 13(1) of the Constitution; however arbitrary the law might probably be.

[14] The learned DPP submitted the following issues:

(a) that the investigations carried out by the Chief Inspector Muhamad Nazif on the first to fifth respondents, he found that the monies in the bank accounts belonging to them were proceeds of illegal public lottery;

(b) the fourth respondent had used the proceeds of unlawful activity, namely, illegal public lottery to acquire the vehicles;

(c) that the respondents have failed to show the cause why the properties seized should not be forfeited. The burden of proof is on the second to fifth respondents to show that the properties shall not be forfeited;

(d) the respondents have failed to testify on the balance of probabilities that the court can properly release the properties seized to them; and

(e) that the supplementary affidavits are admissible notwithstanding objection by the respondents.

[15] Learned counsel for the respondents submitted as follows:

(i) No criminal charge under predicate offence. There is no prosecution under the Act. The learned DPP should not automatically resort to this section 56 of the Act merely on the ground of the suspicious circumstances of the police without credible evidence to support the allegations.

(ii) The seizure and freeze of the property is illegal, irrational and procedural impropriety. Whenever the freezing order given for bank accounts, the section 44(1) triggers. The freezing order made by the enforcement agency cease to have effect after ninety days from the date of the order; if the person against whom the order was made had not been charged with an offence under this Act (s 44(5)) of the Act. The freezing order in this case was given on 6th July 2010.

(iii) Failed to satisfy this court that the property is the proceeds of unlawful activity.

(iv) The Applicant cannot ask the court to issue notice under s 61 of the Act without satisfying the forfeiture order against the respondents.

(v) The learned DPP relied in his affidavit that all the respondents obtained

A

the properties from the unlawful activity of section 4A (1) Emergency Ordinance (Prevention of Crime and Public Order) 1969, which is not a serious offence.

DECISIONS OF THIS COURT

B

[16] Section 56 of the Act, on which the forfeiture application is based and which falls under Part (VI) of the Act provides (insofar as it is relevant to the present enquiry) that the:

C

> High Court Judge shall … make an order for the forfeiture if the Judge is satisfied on a balance of probabilities that the property concerned … Is the subject matters of an offence referred in the second schedule.

D

[17] Thus the focus at this stage is not so much on the question whether or not the respondents' version is true or not. The focus is not on the wrongdoer, but on property that has been used to commit an offence or which constitutes the proceeds of crime. Therefore, for the present application the guilt or wrong doing of the owner of property is not primarily relevant to the proceedings.

E

[18] In deciding whether or not the learned DPP has discharged the onus resting upon him in the present case, the following issues have to be considered in turn:

(a) on which offence(s) does the application rely?;

F

(b) are those offence(s) referred to in Second Schedule to the Act?;

(c) is the property sought to be forfeited a subject matter of the serious offence, as contemplated by the Act?; and

G

(d) is the sufficient evidence as to the issue (c)?

WHICH OFFENCE DOES THE APPLICANT RELY?

H

[19] The applicant's notice of motion was supported by the founding affidavit of the learned DPP (encl 3) which he relied for purposes of the present application for forfeiture order expressly and clearly affirmed as follows:

(a) at para 38 of his affidavit states:

I

> (b) Siasatan terhadap Responden Pertama dan Reponden Kedua di bawah sub-seksyen 4A (1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 telah dijalankan oleh Pegawai Penyiasat Polis DiRaja Malaysia Cif Inspektor Polis Muhamad Nazif Bin Wahab.

(c) Saya pohon untuk merujuk kepada perenggan 3,4,5,6,7,8,9,10,11,12,13,14,15,16 &17 affidavit Cif Inspektor Muhamad Nazif mengenai kesalahan yang dilakukan di bawah sub-seksyen 4A(1) Ordinan Darurat (Ketenteraman Awam Dan Mencegah Jenayah) 1969.

(f) Siasatan yang dijalankan menunjukkan bahawa Responden Pertama,Reponden Kedua, Responden Ketiga, Responden Keempat dan Responden Kelima telah memperolehi harta-harta alih tersebut hasil daripada aktibiti haram iaitu kesalahan di bawah sub-seksyen 4A(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969.

(b) para 37 relates another offence as follows:

> Hasil daripada siasatan yang dijalankan saya berpuas hati bahawa harta yang disita di perenggan 6,7,8,9,10,11,12,13,14,28,31 dan 34 di atas adalah hata-harta alih dan takalih berkaitan dengan suatu kesalahan di bawah sub-seksyen 4(1) AMLATFA 2001.

[20] As rightly pointed out by learned counsel for the respondents that it is not quite clear from the affidavit of the learned DPP on which offence(s) the applicant relies for purposes of this forfeiture application. It must be pointed out that the forfeiture application is a serious matter and the owner stands to lose property because the property was the subject matter of the offence of s 4(1) of the Act, it demands that the applicant to set out clearly the case he or she is called to answer. It is my finding of fact that there is no satisfactory proof from the applicant from offence they are relying for the purpose of forfeiture application.

ARE THOSE OFFENCES REFERRED TO IN SECOND SCHEDULE?

[21] The next question to consider is whether the offences mentioned above fall within the Second Schedule of the Act? The illegal public lottery is within the ambit of the Second Schedule but the s 4A(1)of the Emergency Ordinance (Prevention of Crime and Public Order) 1969 is not a serious offence as spelt out in Second Schedule. This again is the second flaw that I found on the applicant's application. *Is the property subject matter of serious offence?*

[22] The properties which were claimed by the learned DPP as proceeds of unlawful activity of s 4A(1) of the Emergency Ordinance (Prevention of Crime and Public Order) 1969 not a subject matter of serious offence. There is no sufficient evidence to link the crime committed and the property. The burden is on the applicant to satisfy the court that the property is the subject matter of the offence under s 4(1) of the Act. Learned counsel for the respondents invited my attention to the decision rendered in *SK Tangahkaliswaran a/l Krishnan v*

Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149 at p155; [2009] 6 CLJ 705 at p 710, His Lordship Gopal Sri Ram FCJ said:

> And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection. One of the tests that a court applies to test allegations in affidavits is to see whether they are contradictory in nature. See *Eng Mee Yong vs Ors v Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18. Further, where a party upon the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him. Put a little differently, whereas in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn.

[23] Applying the principles I had referred to earlier, it is my considered view that the applicant's application cannot succeed.

SUPPLEMENTARY AFFIDAVITS

[24] In deciding whether the supplementary affidavits can be accepted at such a late stage of the proceedings after close the case and finished the submission, I heavily relied on the decision of the Supreme Court in the case of *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri* [1994] 3 AMR 40 at p 2047 where it was held at p 2058 para 30:

> It follows that the principle against any attempt to adduce additional affidavit evidence especially after a grieved party has closed its case in case affecting the liberty of the subject, must be applied with even greater vigilance by the trial court.

[25] Therefore the filing of the supplementary affidavits by the applicant without obtaining leave of the court and also for the reasons mentioned above is not allowed.

CONCLUSION

[26] Based on the evidence adduced by the learned DPP, I am of the opinion that the evidenced adduced is insufficient to satisfy me that the properties are the subject matter of or was used in the commission of an offence under sub-s 4(1) of the Act. As such the application for the forfeiture order against all the respondents dismissed. As such notice under s 61 of the act is premature. Section 61 only comes into play when the court making the order of forfeiture under s 56 of the Act.

[27] Therefore the application for forfeiture is dismissed and all the properties must be released immediately to the respondents respectively.

Application for forfeiture dismissed.

Reported by Ashgar Ali Ali Mohamed